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6 IN THE UNITED STATES DISTRICT COURT

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10 TERRELL CROSS, No. C 07-3941 WHA (PR)

11 Petitioner,
12 v.
13 D. K. SISTO, Warden,
14 Respondent.

15 _____ / **GRANT OF LEAVE TO PROCEED
16 IN FORMA PAUPERIS; ORDER TO
17 SHOW CAUSE**

18 Petitioner, a California prisoner currently incarcerated at California State Prison-Solano,
19 has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He also
20 requests leave to proceed in forma pauperis.

21 Venue is proper because the conviction was obtained in Alameda County, which is in
22 this district. *See* 28 U.S.C. § 2241(d).

23 **STATEMENT**

24 A jury convicted petitioner of second degree murder, possession of a firearm by a felon,
25 and two counts of assault with a deadly weapon. The court also found true allegations of six
26 prior convictions. The court sentenced him to a total indeterminate term of fifty-four years to
27 life. *People v. Cross*, 2004 WL 2287812, *1 (Cal. App. 2004). The conviction and sentence
28 were affirmed on appeal by the California Court of Appeal and the California Supreme Court
denied review. Petitioner was also unsuccessful with several state habeas petitions.

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DISCUSSION2 *A. Standard of Review*

3 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose*
6 *v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading
7 requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ
8 of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state
9 court must "specify all the grounds for relief which are available to the petitioner ... and shall
10 set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of
11 the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not
12 sufficient, for the petition is expected to state facts that point to a 'real possibility of
13 constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
14 688, 689 (1st Cir. 1970). "Habeas petitions which appear on their face to be legally insufficient
15 are subject to summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d
16 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring)).

17 *B. Legal Claims*

18 As grounds for federal habeas relief, petitioner asserts that: (1) his Sixth and Fourteenth
19 Amendment rights were violated by exclusion of evidence that the victim's gun had recently
20 been used in a homicide; (2) his due process rights were violated by the trial court's denial of a
21 motion to dismiss two counts of assault with a deadly weapon that were added after the
22 preliminary hearing; (3) his Fifth, Sixth and Fourteenth Amendment rights were violated when
23 he, a black man, was tried by an all-white jury; (4) his trial counsel was ineffective in failing to
24 investigate and call witnesses; (5) the prosecutor committed misconduct by giving an interview
25 the day before closing argument in an attempt to prejudice the jury; (6) appellate counsel was
26 ineffective in failing to raise issues (1) through (5), above; (7) his Sixth and Fourteenth
27 Amendment rights were violated by the trial court's disallowance of questions about the
28 victim's criminal activities; (8) the trial court erred by giving an instruction which could have

1 been construed by the jury to require verbal notification that a combatant wishes to discontinue
2 the fight, a requirement which would be contrary to California law; (9) failure to instruct
3 correctly on lesser offenses violated his constitutional rights; and (10) the errors set out above
4 cumulatively amount to a denial of due process.

5 In issue eight petitioner raises only a question of state law, which cannot be the basis for
6 federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The claim in issue
7 nine also cannot be the basis for federal habeas relief because failure of a state trial court to
8 instruct on lesser-included offenses in a non-capital case does not present a federal
9 constitutional claim. *See Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000). And issue ten
10 cannot be the basis for federal habeas relief because although there can be prejudice based on
11 cumulative constitutional errors even if none of the errors is itself prejudicial, where there is no
12 single constitutional error existing, nothing can accumulate to the level of a constitutional
13 violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). That is, there is no such
14 thing in federal habeas practice as cumulative constitutional error.

15 For these reasons, issues eight, nine and ten will be dismissed.

16 CONCLUSION

17 1. Leave to proceed in forma pauperis (document number 2 on the docket) is **GRANTED**.
18 2. Issue eight, nine and ten are **DISMISSED**. The remaining issues are sufficient to
19 require a response. The clerk shall mail a copy of this order and the petition with all
20 attachments to the respondent and the respondent's attorney, the Attorney General of the State
21 of California. The clerk shall also serve a copy of this order on the petitioner.
22 3. Respondent shall file with the court and serve on petitioner, within sixty days of
23 service of this order, an answer conforming in all respects to Rule 5 of the Rules Governing
24 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
25 Respondent shall file with the answer and serve on petitioner a copy of all portions of the state
26 trial record that have been transcribed previously and that are relevant to a determination of the
27 issues presented by the petition.

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United States District Court

For the Northern District of California

1 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
2 court and serving it on respondent within thirty days of service of the answer.

3 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
4 as set forth in Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a
5 motion, petitioner shall file with the court and serve on respondent an opposition or statement of
6 non-opposition within thirty days of receipt of the motion, and respondent shall file with the
7 court and serve on petitioner a reply within 15 days of receipt of any opposition.

8 5. Petitioner is reminded that all communications with the court must be served on
9 respondent by mailing a copy of the document to respondent's counsel. Papers intended to be
10 filed in this case should be addressed to the clerk rather than to the undersigned. Petitioner also
11 must keep the court informed of any change of address by filing a separate paper with the clerk
12 headed "Notice of Change of Address," and comply with any orders of the court within the time
13 allowed, or ask for an extension of that time. Failure to do so may result in the dismissal of this
14 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez*
15 *v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

16 **IT IS SO ORDERED.**

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18 Dated: August 27, 2007.

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Wm. Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE